Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE ALUMINUM ASSOCIATION, INC.,
and
NATIONAL ASSOCIATION OF
RECYCLING INDUSTRIES, INC.,
Petitioners,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS THE ALUMINUM ASSOCIATION, INC. and NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.

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September 1986

CASELLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC 20036 - 223-1220

TABLE OF CONTENTS

Page

I. REPLY TO THE FEDERAL RESPONDENTS 1

II. REPLY TO THE RAILROAD RESPONDENTS 5

III. CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Aberdeen & Rockfish R. Co. v. *SCRAP*,
422 U.S. 289 (1975) 2

City of Philadelphia v. New Jersey,
437 U.S. 628 (1978) 3

Consolidated Rail Corp. v. *NARI*,
449 U.S. 609 (1981) 2

National Association of Recycling Industries v. ICC,
585 F.2d 522 (D.C. Cir. 1978) 2

National Bank of Davis v. *Office of Comptroller of Currency*,
725 F.2d 1390 (D.C. Cir. 1984) 6

United States v. *SCRAP*,
412 U.S. 669 (1973) 2

Statutes:

42 U.S.C. § 4312 2

42 U.S.C. § 6201 3

42 U.S.C. § 6901 3

Agency Proceedings: Page

Ex Parte No. 319, 356 ICC 113 (1977) 2

Ex Parte No. 394, 365 ICC 304 (1980) 2

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REPLY BRIEF FOR PETITIONERS THE ALUMINUM ASSOCIATION, INC. and NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC.

This brief is submitted in reply to the Oppositions filed by the federal Respondents and the railroad Respondents.

I. REPLY TO THE FEDERAL RESPONDENTS

The Government agrees with Petitioners with respect to the proper interpretation and implementation of Section 204(e) and with respect to the timeliness of the appeal under the Hobbs Act. The Government's position is that the Court erred on both counts. Nevertheless, the Government concluded that the issues raised are not of sufficient significance to warrant review.

This startling conclusion was reached in spite of the fact that transportation issues in the recycling industry have been a matter of continuing concern to Congress and the Courts over the past twelve years. As pointed out in the Petition (p. 4), Congress has passed three statutes, the purpose of which has been to rectify and restructure inequitable freight rates on recyclable commodities. Litigation arising out of these statutes has resulted in two investigations of major proportions before the Interstate Commerce Commission,[1] and six decisions of the United States Court of Appeals for the District of Columbia Circuit. Pet., p. 4. Moreover, transportation issues in the recycling industry have been reviewed by this Court three times.[2] At a time when these longstanding issues were about to be resolved, the appellate court's decision has blown the legislative remedy apart and it is indeed disappointing that the Government now believes the recycling industry is so unimportant that the erroneous decision of the appellate court should be allowed to stand.

The fact is, of course, that recycling is a growing, dynamic new industry in the United States. Its vitality is fueled by the continuing need to develop an economical and environmentally sound method of disposing of the vast amounts of waste generated in our industrial society.[3] Recycling is directly concerned with the National Environmental Policy Act.[4] Recycled aluminum results in an enormous saving of energy in furtherance of the poli-

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[1] *Ex Parte No. 319*, 356 ICC 113 (1977); *Ex Parte No. 394*, 365 ICC 304 (1980).

[2] *Consolidated Rail Corp.* v. *NARI*, 449 U.S. 609 (1981); *Aberdeen and Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *United States* v. *SCRAP*, 412 U.S. 669 (1973).

[3] *National Association of Recycling Industries v. ICC*, 585 F.2d 522, 527 fn. 16 (D.C. Cir. 1978).

[4] 42 U.S.C. § 4312.

cies of the Energy Conservation Policy Act.[5] Waste paper is generated in vast quantities and much of it can be recycled for a variety of uses. Recycled aluminum cans are the principal containers for the $70 billion beverage industry in furtherance of the policies of the Solid Waste Disposal Act.[6] The critical importance of recyclable materials continues to be emphasized by legislative and administrative proceedings on the federal, state and local levels which are concerned with utilization and disposal of solid waste.[7] Economical transportation of waste material is vital for the continued viability of recycling.

As a result of the decision of the United States Court of Appeals under consideration herein, shippers of recyclable commodities are powerless to bring complaints before any administrative or judicial body to secure compliance with maximum rate orders issued by the Interstate Commerce Commission. As it now stands, the Commission is required to set a maximum level for recyclable commodities each year, but no shipper has any right to have such maximum rate order applied to movements of his commodities. It is plain that such an irrational interpretation has virtually destroyed the effectiveness of Section 204(e) and has frustrated the purpose of the Act.

The Government also agrees with Petitioners that the time limitations of the Hobbs Act should have precluded appellate review in this case. The Government's view of the Hobbs Act decision is that, while erroneous, it will have no adverse effect of broad significance. This is undu-

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[5] 42 U.S.C. § 6201.

[6] 42 U.S.C. § 6901.

[7] The problems of disposal of solid waste and the efforts of states to restrict disposal within their borders were encountered by this Court in *City of Philadelphia* v. *New Jersey*, 437 U.S. 628 (1978).

ly simplistic. If the validity of the complaint procedure was decided in 1981 (and the Government concedes it was), surely the railroads were under some time limitation to file a petition for review. The Government contends there is no issue of law involving the Hobbs Act because the Court concedes that such a petition must be filed within sixty days after the issuance of the final order.

However, the Court of Appeals permitted the railroads to revisit the issue decided in 1981, in July of 1983 – nearly two years later. Thus, under the Court's theory, an issue decided by the administrative agency may be reviewed at any time in the future by the simple process of filing a Petition for Reopening or, as here, a Petition for Declaratory Order. Such unrestricted procedure leads to monstrous injustice to parties attempting to follow the agency's order. In this case, more than twenty shippers of recyclable commodities filed complaints committing a large expenditure of funds and manpower to follow a procedure prescribed by the Commission and apparently unopposed by the railroads. To permit the railroads to then challenge the procedure years later is the very type of injustice which the Hobbs Act was designed to prevent.

Nor is the recyclable complaint procedure an isolated case as the Government suggests. The rationale of the appellate court's holding could have an adverse impact in a variety of situations. For example, in a licensing proceeding, where a utility applicant is granted a certificate of public convenience to construct a facility and serve a specified market area, it would be unthinkable for a competing utility, which was a party to the licensing proceeding, to wait until the plant to provide such service has been constructed and then challenge the issuance of the license by means of filing a petition to reconsider and then

an appeal. In essence, however, that type of procedure is condoned by the appellate court's decision here.

II. REPLY TO THE RAILROAD RESPONDENTS

The railroads oppose the petition principally by attempting to stigmatize the nature of the complaints filed by shippers requesting reductions in their rates and refunds. Seven times in the course of their nine-page brief the railroads refer to the complaints as "sharp shooting" complaints, Evidently the term is intended to convey the notion that Petitioners have undertaken action which is morally reprehensible or, in some fashion, have seized upon an unintended remedy to secure a windfall at the expense of the overburdened rail carriers. However, these complaints were filed pursuant to specific orders of the Interstate Commerce Commission referred to and repeated at least three times during the course of the Ex Parte No. 394 investigation. App. 101a, 90a, 44a. At no time were any of the shippers under any illusions that the territorial average reductions would constitute anything other than token compliance with the statutory mandate. Ultimately, all parties understood that if Section 204(e) was to be effective, compliance must be obtained by actions brought by the shippers. The complaint procedure was developed by the Commission. Petitioners faithfully followed the Commission's directions and filed complaints. No motions to dismiss were filed. The railroads' tactic, obviously, is an attempt to divert attention from the erroneous interpretation of the statute by the appellate court.

The railroads insist that there is no issue of law involved in the Hobbs Act decision. They cite the fact that their Petition for Review was filed within sixty days from the denial of their Petition for Declaratory Order. That peti-

tion was in substance a petition for reconsideration and was treated as such by the Commission. App. 44a. Thus, the legal issue before this Court is whether the filing of a petition requesting reconsideration of an issue decided two years earlier will allow the issue to be reviewed in spite of the sixty-day time limit in the Hobbs Act. The Court of Appeals firmly rejected such a ploy in 1984,[8] but the same court has permitted it in this case just two years later.

[8] *National Bank of Davis* v. *Office of Comptroller of Currency*, 725 F.2d 1390 (D.C. Cir. 1984).

III. CONCLUSION

The Government and Petitioners agree that the decision of the Court below was erroneous and should not be sustained. The Opposition of the railroads does nothing to refute the arguments of Petitioners on the merits. Accordingly, the Writ of Certiorari should therefore be granted.

Respectfully submitted,

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